

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEBRASKA

3

4 UNITED STATES OF AMERICA,) 4:05CR3019
5 Plaintiff,)
6 vs.) TRANSCRIPT
7 KHALAT JAMALTHAEAL ALAMA,) (Pages 1 to 63)
8 Defendant.)

9

10 Hearing held before the Honorable David L.
11 Piester, United States Magistrate Judge, on August
12 31, 2005, in Lincoln, Nebraska.

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14

15 APPEARANCES:

16 Ms. Sara E. Fullerton
17 Assistant U.S. Attorney
17 100 Centennial Mall North
Suite 487, Federal Building
18 Lincoln, Nebraska 68508 for Plaintiff

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20 Mr. Michael D. Gooch
21 Attorney at Law
12826 Shirley Street
Omaha, Nebraska 68144 for Defendant

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WITNESS Direct Cross Redirect Recross

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FOR THE PLAINTIFF:

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1. Kirk McAndrew 5 25 41, 46

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1 (On August 31, 2005, at 2:12 p.m., the following
2 proceedings were held:)

3 THE COURT: Sorry for the
4 interruption and the delay. My apologies.

5 Ms. Fullerton.

6 MS. FULLERTON: Your Honor, this is
7 the matter of United States versus Khalat Alama,
8 Docket 4:05CR3019, matter comes on for hearing on
9 defendant's motion to suppress.

10 THE COURT: Mr. Gooch, is the defense
11 ready to proceed?

12 MR. GOOCH: We are, Your Honor.

13 THE COURT: All right. How many
14 witnesses do you have?

15 MS. FULLERTON: One.

16 THE COURT: Okay. Do you wish to
17 make an opening statement?

18 MS. FULLERTON: I would waive, Your
19 Honor.

20 MR. GOOCH: May it please the Court,
21 at this time I would offer to stipulate that the
22 apartment that will be discussed in the testimony
23 is an apartment -- I believe the address is 526 A
24 Street in Lincoln, Lancaster County, State of
25 Nebraska, was leased to Khalat Alama and I

1 believe -- I'm not certain if Nicole Delgado was on
2 the lease, but I -- I am prepared to stipulate that
3 Mr. Alama's name was on the lease. I offer that in
4 order to establish standing.

5 I don't believe the parties dispute, Your
6 Honor, that the entry was accomplished without a
7 warrant. And as a consequence, assuming that the
8 government agrees with my stipulation concerning
9 standing, the burden then would shift to the
10 government to show an exception to the warrant
11 requirement.

12 We don't anticipate calling any witnesses,
13 unless the government doesn't agree to the
14 stipulation as to the standing issue.

15 MS. FULLERTON: No, I stipulate it's
16 his apartment.

17 THE COURT: That he's on the lease?

18 MS. FULLERTON: Your Honor, I can't
19 stipulate that he's on the lease. I haven't seen
20 the lease. I do know however at least the
21 information provided to the police department was
22 that he was living at that apartment.

23 THE COURT: All right.

24 MS. FULLERTON: So I would stipulate
25 that he was living there.

1 THE COURT: That's fine. Okay. You
2 may call your first witness.

3 MS. FULLERTON: Government calls
4 Officer McAndrew.

5 THE COURT: Please come forward to
6 the clerk's desk to be sworn.

7 THE CLERK: Please state your full
8 name and spell your last name.

9 THE WITNESS: It's Kirk, K-I-R-K,
10 middle initial D, last name McAndrew, M-C, capital
11 A-N-D-R-E-W.

12 THE CLERK: Do you solemnly swear or
13 affirm that the testimony you are about to give
14 will be the truth to the best of your knowledge and
15 belief?

16 THE WITNESS: Yes.

17 THE CLERK: Please have a seat.

18 THE COURT: Go ahead.

19 KIRK D. McANDREW,

20 Called as a witness, being duly sworn,
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MS. FULLERTON:

24 Q. Sir, what is your current employment?

25 A. I'm employed by the City of Lincoln Police

1 Department.

2 Q. Okay. And how long have you been with the
3 Lincoln Police Department?

4 A. It's almost 19 years.

5 Q. Okay. And could you describe what your usual
6 job entails?

7 A. At the present time I'm working with the
8 traffic unit, but my usual job when I'm not on that
9 assignment would be to just handle routine calls,
10 domestic fights, accidents, assaults, basic variety
11 of different things, loud parties.

12 Q. Okay.

13 A. Things of those natures.

14 Q. Are you assigned to a particular area within
15 the city?

16 A. At the present time just the City of Lincoln.

17 Q. Okay. And do you work in uniform?

18 A. Yes, I do.

19 Q. And do you drive a marked cruiser?

20 A. It's a marked cruiser, the lights are in the
21 inside now.

22 Q. Okay.

23 A. But it is a marked cruiser.

24 Q. But it's identified as a Lincoln Police
25 Department cruiser?

1 A. Yes.

2 Q. Okay.

3 A. Uh-huh.

4 Q. And were you so employed on January 11th of
5 2005?

6 A. Yes, I was.

7 Q. And on January 11th of 2005 did you get a
8 dispatch to contact Marcia Delgado?

9 A. Yes, I did.

10 Q. And what was -- what was the information you
11 got from dispatch about that call?

12 A. It was just a -- some information about a
13 distressful-type phone call that she had received.

14 Q. All right. And so did you go have contact
15 with Marcia Delgado?

16 A. Yes, I did.

17 Q. Where did you go to contact her?

18 A. 1817 Sewell in Lincoln.

19 Q. All right. And did she report a phone call
20 that she had received to you?

21 A. Yes.

22 Q. And what kind of a phone call was that? Was
23 it on a home phone? A land line?

24 A. It was a cell phone message.

25 Q. A voicemail message?

1 A. I -- I think on the cell phone there was a
2 message.

3 Q. Okay. And you got this dispatch on January
4 11, 2005; is that right?

5 A. Yes.

6 Q. Did Marcia Delgado indicate to you when this
7 call had been received?

8 A. Yes.

9 Q. What did she say?

10 A. She said it was on 1/9 of '05.

11 Q. January 9th of '05?

12 A. Correct, uh-huh.

13 Q. Okay. And have you reviewed your report
14 regarding this matter before coming to court?

15 A. Yes.

16 Q. Was there an error in the date given by the
17 dispatcher?

18 A. Correct.

19 Q. And what was the error with respect to the
20 dispatcher?

21 A. Well, I think that they had indicated that it
22 had happened much prior, which would've been
23 2/9 (sic) of '04.

24 Q. 12/9 of '04?

25 A. Right.

1 Q. Okay. But in talking to Ms. Delgado she told
2 you it was two days before you talked to her?

3 A. That's correct.

4 Q. Okay. Or approximately two days before?

5 A. Yeah, roughly, uh-huh.

6 Q. And did she have this call available for you
7 to listen to?

8 A. Yes, she did.

9 Q. It was on her cell phone?

10 A. Right.

11 Q. And did she play the message for you?

12 A. She did.

13 Q. And what did you hear?

14 MR. GOOCH: Excuse me, Your Honor,
15 object if it's being offered for the truth of the
16 matters asserted -- asserted.

17 If on the other hand it's to explain the
18 officer's actions, that's a different thing than
19 whether the words that were spoken are to be
20 accepted by the Court as true.

21 THE COURT: What's your position?

22 MS. FULLERTON: Well, my position is,
23 A, it's a suppression hearing so the rules of
24 evidence do not apply. But it's not being offered
25 for the truth of the matter asserted. It's being

1 offered to show why the officer did what he did.

2 THE COURT: The objection's
3 overruled.

4 Q. (By Ms. Fullerton) What did you hear, Officer
5 McAndrew?

6 A. Well, I heard a couple shrill-type screams,
7 and then I heard someone -- a male voice come on
8 and say, I'm going to kill you.

9 Q. Okay. And did either of those voices identify
10 themselves on that particular recording?

11 A. I don't believe they were identified by name.

12 Q. The screams, did they appear -- did they sound
13 like a man or a woman?

14 A. It was -- sounded like a woman to me.

15 Q. Was there any -- was there any notation on the
16 recording as to when that call was made?

17 A. There was no date mentioned on the message.

18 Q. It was not the type that has a time and a date
19 message stamp on it?

20 A. No, I don't believe there was -- there was
21 anything to indicate that.

22 Q. Okay. Did Marcia Delgado tell you when she
23 believed she got that call?

24 A. She said she got it a couple days prior.

25 Q. On January 9th?

1 A. Right.

2 Q. And did she say approximately when?

3 A. I can't -- I can't remember -- I don't know
4 exactly when that was.

5 Q. Okay. Now, after you listened -- when you
6 heard this call, did you try and record that?

7 A. I did.

8 Q. And do you still have that recording?

9 A. I do not.

10 Q. Do you know what happened to that recording?

11 A. I'm not sure what happened to the recording.

12 Q. And as far as we know it wasn't tagged into
13 property; is that correct?

14 A. As far as we know it was not.

15 Q. Okay. In talking with Marcia Delgado did she
16 give you an idea as to who she thought was involved
17 in this call?

18 A. Yes.

19 Q. And who did she tell you was involved?

20 A. She thought it was her niece, Nicole
21 Delgado --

22 Q. Okay.

23 A. -- was the one that was screaming. And she
24 also referred, I think, to the other person
25 involved as being Khalat Amad or Amad, something of

1 that nature.

2 Q. First name was Khalat?

3 A. That's correct.

4 Q. And after you got this information from Marcia
5 Delgado and had listened to the tape -- or not the
6 tape, the record -- the cell phone message, what
7 did you do then?

8 A. I tried to find out where Nicole Delgado would
9 be at so I could check her welfare to make sure she
10 was okay.

11 Q. And how did you go about doing that?

12 A. I either received information from the lady
13 I'd spoken with, or through our intelligence at the
14 police department --

15 Q. Okay.

16 A. -- and obtained an address.

17 Q. So you got an address?

18 A. I did.

19 Q. But you're not sure whether it came from
20 Marcia Delgado or from the police department
21 records?

22 A. I'm not positive.

23 Q. At any rate, was there an address that you
24 went to to follow up on this?

25 A. Yes.

1 Q. And what address was that?

2 A. 526 A, as in Adam, number A.

3 Q. Okay. In Lincoln?

4 A. Or letter A, rather. Yes.

5 Q. And what kind of a -- what kind of a -- is
6 that a residence?

7 A. It's actually a -- I believe a duplex. I
8 believe there's just two units there. A duplex or
9 a triplex.

10 Q. Okay.

11 A. More than one dwelling there.

12 Q. And did any other officers initially go to
13 that residence with you?

14 A. Yes.

15 Q. Who went with you?

16 A. Officer Hruza.

17 Q. Officer Hruza. And what did you and Officer
18 Hruza do when you got to 526 A Street?

19 A. We tried to get contact at the residence to
20 contact the people that were living there.

21 Q. And how did you do that?

22 A. I believe we knocked on the doors and tried to
23 get someone to come to the door, no one ever did.

24 Q. Nobody answered?

25 A. No.

1 Q. And at 5 -- this particular duplex, is it
2 ground level? Two level? What kind of a --

3 A. It's -- it's a -- I guess I can describe it as
4 a ground level. There's a front side to the
5 duplex, which faces south towards A Street. And
6 the area that we were concerned about would've been
7 the back side portion on the west side.

8 Q. Okay. Does the front side have a driveway
9 that goes out to A Street?

10 A. I don't believe that it does.

11 Q. Okay.

12 A. I don't believe there's any parking on the A
13 Street side, but there is a parking lot in the
14 back.

15 Q. Is there an alley back there?

16 A. Yes.

17 Q. So there's a parking lot between the building
18 itself and the alley?

19 A. That's correct.

20 Q. Okay. Were there any cars parked in the
21 parking lot behind the building?

22 A. There -- during the course of the
23 investigation there was a Nebraska-plated white
24 Cadillac, and letters, numbers, being OPG745.

25 Q. Okay. Now after you and Officer Hruza tried

1 to make contact at 526 A, number A, and were
2 unsuccessful, what did you do then?

3 A. I contacted Sergeant Heermann with Lincoln
4 Police Department.

5 Q. Okay. Did you go to the police department or
6 did you do that on the radio?

7 A. We had contact eventually at the police
8 department. I was concerned that, you know, that
9 we didn't make our contact to make sure this Nicole
10 Delgado was okay.

11 Q. All right. And did you ask for or receive any
12 additional records with respect to Nicole Delagdo
13 and a person with the first name of Khalat during
14 your investigation?

15 A. I received some information about a prior
16 domestic assault --

17 Q. Okay.

18 A. -- that occurred back in 2004.

19 Q. Or that had been reported in 2004?

20 A. That's correct.

21 Q. Okay. Involving the two of them?

22 A. Yes, Mr. Alama and Nicole Delgado, excuse me.

23 Q. Okay. And how much information did you
24 receive about his prior assault report?

25 A. I just had information that -- the case number

1 and I believe also that I had information that he
2 was cited for domestic assault on her.

3 Q. Okay. And have -- when you -- going back to
4 when you were first at 526 A Street --

5 A. Uh-huh.

6 Q. -- you tried to make contact at apartment
7 number A; is that right?

8 A. Yeah, it -- like I said, I believe it was
9 apartment A or it's just 526. But it is on the
10 west side.

11 Q. Okay. The west side. And did you try and
12 contact any of the neighbors in that area?

13 A. I did.

14 Q. And who did you try and contact?

15 A. I contacted a Linda Barb.

16 Q. And where did Linda Barb live?

17 A. Linda Barb lives at the address of 528 A
18 Street, I believe. Actually, it's on the front
19 side of the complex there. It's off the porch
20 area. The front porch area is where she lives.

21 Q. The A Street side?

22 A. Correct.

23 Q. And does that -- does her residence share a
24 wall or something with -- with -- with the one
25 where Nicole Delgado and Khalat Alama were expected

1 to be?

2 A. Yes.

3 Q. Okay. And did you talk to her?

4 A. I did.

5 Q. And did she give you any information about the
6 persons who lived in the apartment on the -- part
7 of the duplex on the back side?

8 A. Yes, she did.

9 Q. What information did she give you?

10 A. Well, she indicated there hadn't been too much
11 problems, but there was some problems with loud
12 music and -- as well as she had indicated that if
13 the car was in the back that Mr. Alama would be
14 there and as well as the female.

15 Q. So she told you in essence if the car's there
16 he's there?

17 A. Yes.

18 Q. And what did she say about Ms. Delgado, about
19 whether or not she would leave the residence?

20 A. She said that she never leaves the residence,
21 she said.

22 Q. Did you also try and contact the owner of the
23 building?

24 A. I did.

25 Q. And how did you find out who the owner of the

1 building was?

2 A. I believe it would've been through Linda Barb.
3 And I was unable to get a hold of the owner of the
4 building.

5 Q. Okay. After you had acquired the information
6 from Marcia Delgado, listened to the tape, talked
7 to Linda Barb, attempted to contact Nicole Delgado
8 at the apartment, and learned about the prior
9 report of an assault, did you have some additional
10 conversation with other officers?

11 A. Yes, I did.

12 Q. And who was involved in that conversation?

13 A. Captain Thoms, and I believe also that
14 Sergeant Heermann would've been present at that
15 time too.

16 Q. Okay. And was there a determination made as
17 to what should be done as a result of the
18 information you'd obtained?

19 A. Yes. The captain's opinion was that we needed
20 to really try to make contact with this person to
21 make sure she was okay.

22 Q. Okay. And was any attempt made to call on the
23 telephone to this residence?

24 A. I don't believe -- I -- I don't know whether
25 we had phone contact or tried phone contact. But

1 it is a part of our procedure, we would normally
2 try to make phone contact and not make any entry to
3 any place unless absolutely necessary to do so.

4 Q. Okay. So it would be part of your normal
5 procedure to do that?

6 A. Absolutely.

7 Q. Do you know for sure whether it was done in
8 this case?

9 A. I -- I -- I don't recall.

10 Q. Okay.

11 A. I do know that we present a risk to ourselves
12 if we enter a situation like that without --

13 MR. GOOCH: I'm going to object to
14 this as volunteered. It's not responsive to the
15 question.

16 THE COURT: Sustained.

17 Q. (By Ms. Fullerton) Okay. At any rate, as far
18 as you know there wasn't any phone contact?

19 A. I -- there would not have been any phone
20 contact with the residence.

21 Q. Okay. So then what did you do?

22 A. I -- Sergeant Heermann and myself as well as
23 Officer Muff who had a lock pick type of set did go
24 to the address to try to make contact there.

25 Q. Okay. Did you try knocking again?

1 A. I believe we did.

2 Q. Did anybody respond?

3 A. No. No one responded.

4 Q. Okay. And so then what did you do?

5 A. We were going to make entry via the lock pick
6 set, but there was a piece of cardboard or board
7 over the west side window that allowed access
8 without using the lock pick set.

9 Q. Okay. So you were able to reach in and unlock
10 the door?

11 A. That's correct.

12 Q. And did you then go into the residence?

13 A. Yes, we did.

14 Q. And what was your reason for going into the
15 residence?

16 A. To check on the welfare of Nicole Delgado.

17 Q. And what happened when you went into the
18 residence?

19 A. We went into the residence through the west
20 side and into the living room area and no one was
21 there. And then we went into the east side bedroom
22 and there was a couple people underneath the
23 covers.

24 Q. And who were those people?

25 A. Khalat Alama and Nicole Delgado.

1 Q. And at that point did you and the other
2 officers separate the two of them to find out what
3 was going on?

4 A. Yes.

5 Q. And what did you do?

6 A. I had Nicole Delgado step into the living
7 room, to investigate whether she had been assaulted
8 or what the situation was.

9 Q. Okay. And did you have a conversation with
10 her?

11 A. I did.

12 Q. And did you play the tape for her?

13 A. I don't remember whether I did or not.

14 Q. Or talk to her about the tape recording?

15 A. I talked to her, most likely, about why we
16 were there; that we were concerned about her.

17 Q. Okay. And she denied there being any problem;
18 is that --

19 A. That's correct.

20 Q. In the process of taking her into the living
21 room to find out what was going on or if anything
22 had happened, did you notice anything in the living
23 room as -- as you were going to talk to Nicole
24 Delgado?

25 A. I did.

1 Q. What did you notice?

2 A. I noticed that on the coffee table that there
3 was a broken vase and it looked like it had been
4 burnt. As well as I noticed a clear baggie-type of
5 envelope that was probably about an inch-and-a-half
6 by inch, somewhere around there, that had some
7 white -- whitish crystal substance in it.

8 Q. And where was that located?

9 A. I believe all on the coffee table.

10 Q. Okay. And was this where you had gone to talk
11 to Nicole?

12 A. That's where she was led into, yes.

13 Q. And at some point in your discussion with her
14 about the situation, did she try and cover that up?

15 A. I don't remember whether she did or not. If I
16 can review my report --

17 Q. If you can refer to the last page.

18 A. Okay. Yes, it would appear from the report
19 that she tried to cover it up with a checkbook
20 cover or something over the top of the transparent
21 baggie.

22 Q. But you'd already seen it at that point?

23 A. Yes.

24 Q. And did you seize the -- seize those items?

25 A. We did. I believe at that point we'd already

1 seen that, and I -- I'd made notice of her hand
2 manipulations.

3 THE COURT: And what? I'm sorry.

4 THE WITNESS: I'd been -- noticed her
5 manipulations with her hands as far as the
6 checkbook cover.

7 Q. (By Ms. Fullerton) But you had seen the bag
8 prior to her --

9 A. I believe -- I believe we did.

10 Q. -- doing that?

11 A. Yes.

12 MS. FULLERTON: Your Honor, I would
13 inquire if the Court has the two exhibits I
14 submitted?

15 THE COURT: Yes.

16 MS. FULLERTON: May I approach?

17 THE COURT: Please come forward.

18 Q. (By Ms. Fullerton) Officer McAndrew, I've
19 handed you what has been marked Exhibits A and B.
20 Do you recognize what's shown in those items?

21 A. Yes, I do.

22 Q. And what is shown in Exhibits A and B?

23 A. In Exhibit A it appears to be the same baggie
24 that had the white crystal substance in it that I
25 confiscated from the scene at 526 A.

1 And Exhibit B appears to be the burnt broken
2 vase that was also confiscated from 526 B (sic)
3 Street.

4 Q. And are those photos of those items that
5 are -- that are contained in property that I asked
6 you to have taken prior to the hearing in this
7 case?

8 A. Yes.

9 MS. FULLERTON: I'd offer Exhibits A
10 and B.

11 MR. GOOCH: No objection.

12 THE COURT: Received.

13 Q. (By Ms. Fullerton) While you were talking to
14 Nicole Delgado in the living room, was -- did
15 Officer Muff stay with Khalat Alama in the bedroom?

16 A. I believe he did.

17 Q. And to your knowledge did Khalat Alama tell
18 Officer Muff that he lived at that apartment?

19 A. I believe he did.

20 MS. FULLERTON: Just a moment, Your
21 Honor.

22 Q. (By Ms. Fullerton) At any time during this
23 investigation were you seeking to find drugs?

24 A No

25 Q. Were you seeking information on the welfare of

1 Nicole Delgado?

2 A. I was.

3 MS. FULLERTON: No further questions.

4 THE COURT: All right.

5 Cross-examination.

6 MR. GOOCH: Thank you.

CROSS - EXAMINATION

8 BY MR. GOOCH:

9 Q. Sir, is it correct that you received the
10 dispatch about 11:22 on the morning of January 11,
11 2005?

12 A. Yes.

13 Q. And I've noticed during your testimony, sir,
14 that you've been looking down. Do you have the
15 report right in front of you?

16 A. I have some reports, correct.

17 Q. Would you please tell us when it is you're
18 reading from a report as opposed to your specific
19 recollection? It's just easier to know when you
20 remember specifically or when you're using the
21 report to get the information. Will you help us
22 with that, please?

23 A. I guess I don't understand the question.

24 Q. Okay. As I ask you questions, if you don't
25 remember, will you tell me -- I'm not going to

1 resist letting you look at the report, I just want
2 to know when you do. Does that make sense?

3 A. -- I can tell you that if you want.

4 Q. Okay. So you got the report at about 11:20 in
5 the morning?

6 A. It would've been about 11:22.

7 Q. 11:22?

8 A. Uh-huh.

9 Q. And January the 11th was a Tuesday?

10 A. I don't recall what day it was.

11 Q. It was the middle of the week?

12 A. -- I don't recall.

13 Q. Was it a weekday?

14 A. I worked -- if I can expand a little bit, I
15 believe at that time I worked Sunday, Mondays off.
16 So I probably wouldn't have been on either of those
17 days. But I don't recall exactly what day.

18 Q. Okay. And you work dayshift?

19 A. I did, correct.

20 Q. At that time?

21 A. Correct, sir.

22 Q. When you got the dispatch you drove directly
23 to Marcia Delgado's residence?

24 A. I drove to her residence.

25 Q. And then you spent some time interviewing

1 Marcia Delgado.

2 A. I did.

3 Q. Then you drove directly to 526 A Street?

4 A. I don't know whether I'd describe it as
5 directly. I do know that we did some investigation
6 to try to determine, you know, where the address
7 was, I believe, and --

8 Q. Now, whether you got the address from Marcia
9 Delgado or from some other source, as soon as you
10 got that then you went to that address?

11 A. I didn't go to that address right --

12 Q. At the time you first went to the 526 A Street
13 address, had you already acquired the information
14 that there had been a report of a prior domestic
15 assault between Khalat Alama and Nicole Delgado?

16 A. I don't -- I don't remember.

17 Q. So it's possible the first time you went out
18 there you didn't possess that information?

19 A. Yeah, I -- I really don't remember whether I
20 did at that time or not, sir.

21 Q. What time did you leave Marcia Delgado's
22 residence after interviewing her?

23 A. I don't know what the exact time was. It was
24 after I interviewed her and acquired the
25 information, I thought it was necessary that I

1 left.

2 Q. Was Officer Hruza in the same vehicle you were
3 in, or did you meet at 526 A Street?

4 A. We would have met. We drive separate
5 cruisers.

6 Q. And when you got there you knocked on the
7 door?

8 A. We did.

9 Q. Did you do the knocking?

10 A. I -- I may have. Officer Hruza may have also.
11 We tried to get a contact with the resident there
12 to check on the welfare.

13 Q. And you got no answer.

14 A. No answer.

15 Q. Did you shout, police department, come to the
16 door, something?

17 A. I don't -- I don't remember. We didn't get a
18 response with loud knocks. Whether we actually
19 announced ourselves as police officers, I'm not
20 sure.

21 Q. Didn't hear any noise from inside the
22 apartment?

23 A. I don't recall any noise.

24 Q. Didn't see any movement inside the apartment?

25 A. I don't recall any movement.

1 Q. Then you made observations about the Cadillac
2 that was parked behind the -- the house?

3 A. Whether the Cadillac was parked there or when
4 we came back the second time, I'm not sure. But
5 the Cadillac was observed there.

6 Q. Would reviewing your report help you draw your
7 attention, sir, to lines 78 through 84?

8 A. It would appear the first time that we went
9 there was -- the Cadillac was there.

10 Q. Now, having reviewed the report, does that
11 refresh your recollection of that detail or are you
12 just trusting the report?

13 A. Well, as I investigated the matter, I did make
14 a report. And I -- there was a white Cadillac
15 parked there. This helps me realize that it was
16 there the first time.

17 Q. Okay. The first time you were there is also
18 the time you talked to the neighbor, this Linda
19 Barb?

20 A. I don't know whether we -- I talked with her
21 immediately or whether that would've been later.

22 Q. You made two trips to 526 A Street?

23 A. We did.

24 Q. The first trip would've included a
25 conversation with Linda Barb?

1 A. I don't know.

2 Q. Okay. Then as I understand it you went back
3 to the police station?

4 A. We did.

5 Q. Okay. Did Investigator Hruza go with you back
6 to the police station?

7 A. I don't know whether Officer Hruza did or not.

8 I know that I met with Sergeant Heermann because I
9 was concerned about the situation.

10 Q. Okay. Do you recall what time you -- the
11 first time you got to 526 A Street, what time you
12 arrived?

13 A. It would've been after 11:22 because I took
14 the initial report down.

15 Q. How much after?

16 A. I -- I really don't know. Hour or less
17 probably.

18 Q. And how long knocking on the door and talking
19 to the neighbors or looking at the parking lot or
20 those kinds of things?

21 A. I -- I don't know how much time we spent
22 there. We ascertained that we were not going to
23 get contact at that time, that no one was going to
24 answer the door there.

25 Q. But you can't tell us today how long you spent

1 checking the situation out before you left.

2 A. No.

3 Q. And when you left, you went back to the police
4 station?

5 A. Eventually we went back to the police station
6 then I contacted Sergeant Heermann, we had some
7 concerns about the situation.

8 Q. Okay. So you were --

9 THE COURT: You had some -- I'm
10 sorry, I didn't hear you. We had some --

11 THE WITNESS: We had some concerns
12 about the situation.

13 Q. (By Mr. Gooch) Okay. So you went back to the
14 police station. Did you contact Sergeant Heermann
15 before you left 526 A, or after you got to the
16 police station?

17 A. I don't know where I contacted her at. It
18 would either have been at the scene or back at the
19 station.

20 Q. But you don't know which?

21 A. I -- eventually we were back at the station.
22 I do know that. Because we had a conversation with
23 Captain Thoms.

24 Q. And how long were you at the police station
25 before you then went back out to 526 A Street?

1 A. I don't know exactly.

2 Q. What time was it when you got back to 526 A?

3 This would've been the second time you were there.

4 A. Second time we were there I think probably
5 would've definitely been prior to 4:00.

6 Q. But how much before 4:00?

7 A. I don't know for sure. It would've been -- I
8 could estimate that it probably would've been
9 within a couple hours of the original incident.

10 Q. But you actually don't know?

11 A. I don't know for -- for sure.

12 Q. And that's not something you made a note of in
13 your report, the times?

14 A. It doesn't appear.

15 Q. I'm sorry?

16 A. It doesn't appear that there was a note made
17 on that.

18 Q. And you don't remember positively whether you
19 obtained a telephone number or made a call inside
20 of the Alama/Nicole Delgado residence?

21 A. I -- I don't know, I --

22 Q. That would be your normal practice.

23 A. It would be.

24 Q. But you don't specifically remember in this
25 case --

1 A. I don't specifically say here.

2 Q. And you didn't make a note of that in your
3 report either.

4 A. I did not.

5 Q. When you went back out to 526 A Street, it's
6 correct that Sergeant Heermann went out there.

7 A. She was there.

8 Q. And Officer Muff was called to meet you there.

9 A. That's correct. He actually -- I believe we
10 contacted him in the police station and he assisted
11 us by going out because he had a lock pick set.

12 Q. Okay. So there were three officers that went
13 out the second time.

14 A. That's correct.

15 Q. And when you got out there the second time,
16 again there was a knock on the door?

17 A. I believe that we also knocked on the door,
18 got no answer.

19 Q. Do you specifically remember that second time
20 knocking on the door?

21 A. I would say I don't specifically remember, but
22 we would not have made entry if I didn't try to get
23 someone to come to the door. It's just not the --
24 the procedure that we would use. We could -- there
25 would be no reason for us to -- if someone came to

1 the door, to use the lock pick or to reach inside
2 and unlock the door.

3 Q. And again as far as you can recall, no noise
4 or anything from inside the premises the second
5 time that you're at 526 A Street?

6 A. That'd be correct.

7 Q. And you don't remember for sure whether your
8 conversations with Linda Barb were part of the
9 first time you were out there or the second time
10 you were out there?

11 A. I contacted her some time during the course of
12 the investigation, and she had given me information
13 about the landlord. I tried to contact the
14 landlord and was unsuccessful.

15 Q. But your conversation with Linda Barb was face
16 to face?

17 A. It was. I talked with her.

18 Q. So -- so this wasn't a contact that you made
19 by telephone, it was a contact face to face?

20 A. I contacted her directly.

21 Q. That could've been the second time you were
22 out there?

23 A. I don't know, sir. During the course of the
24 investigation.

25 Q. Okay. Sir, the door that had the cardboard

1 over a portion of the door, that was an exterior
2 door?

3 A. Yes.

4 Q. And by pushing the cardboard aside you were
5 able to reach inside and unlock the door?

6 A. That's correct.

7 Q. And that was the reason that Officer Muff did
8 not need to use the lock pick kit?

9 A. That's correct.

10 Q. And once that door was unlocked you were able
11 to open that door and gain entry into the entire
12 premises?

13 A. As far as we could tell, the -- we walked into
14 what would be the living room area and then into
15 the bedroom area, which was to the east of there.

16 THE COURT: Which is what?

17 THE WITNESS: I'm sorry. To the east
18 of there.

19 Q. (By Mr. Gooch) And you saw no one in the
20 living room, walked into the bedroom and saw two
21 people under the covers -- or saw people under the
22 covers in the bedroom?

23 A. They were hidden under the covers.

24 Q. Hidden under the covers?

25 A. Correct.

1 Q. So you didn't see them when you walked into
2 the room. You just saw shapes of people under the
3 covers.

4 A. I believe Officer Muff was the one that
5 discovered them under the covers.

6 Q. Did you see them under the covers?

7 A. I did. I did.

8 Q. And were they doing something under the
9 covers?

10 A. Were they doing something under the covers?
11 It appeared that they were hiding because the
12 covers were over the top of their heads.

13 Q. But the covers were moving around, like they
14 were --

15 A. I -- I -- there again, I don't know. We
16 speculated by looking, I believe, that there was
17 people underneath the covers.

18 Q. But it -- but they weren't actively involved
19 in some kind of behavior under the covers.

20 A. I don't know what they were doing under the
21 covers.

22 Q. I'm sorry. Been around the block four times
23 now. Were the covers moving when you saw the
24 covers?

25 A. I -- I don't know, sir.

1 Q. You don't know because you didn't see them, or
2 because you don't remember?

3 A. I don't know whether they were moving or not.

4 Q. When the people came out from under the
5 covers, did they come out at your direction? Did
6 one of the three of you say, come out from under
7 the covers?

8 A. I don't know whether that happened or whether
9 someone actually took the cover from atop the
10 people to make a contact with them.

11 Q. And how was Mr. Alama dressed?

12 A. I don't recall.

13 Q. How was Ms. Delgado dressed?

14 A. I believe she was clothed, because she came
15 out into the living room.

16 Q. Wearing shoes?

17 A. I don't know what kind of shoes or whether she
18 had shoes on or not.

19 Q. At that point is when the two people were
20 separated; is that right?

21 A. That's correct.

22 Q. And was that at your direction, or did
23 Sergeant Heermann say, you take her in there? How
24 did that --

25 A. I don't --

1 Q. Who made those decisions?

2 A. I don't recall.

3 Q. When you were talking to Ms. Delgado you
4 talked to her about the telephone call?

5 A. I talked with her about why we were there, and
6 I probably specifically mentioned the phone call
7 and our concerns about her welfare.

8 MS. FULLERTON: Excuse me, I assume
9 we're referring to Nicole Delgado? We talked about
10 Marcia Delgado earlier.

11 MR. GOOCH: I beg your pardon. Yes.

12 Q. (By Mr. Gooch) We are talking about Nicole
13 Delgado, right?

14 A. Nicole. She's the one we had contact with,
15 yes. I'm sorry.

16 Q. At 526 A Street?

17 A. Correct.

18 Q. And when you asked her about the phone call,
19 she said there was no problem.

20 A. She said there was not a problem.

21 Q. Did she provide an explanation for the
22 screaming on the telephone?

23 A. She said -- yeah, she did say something.

24 Q. An explanation that you were satisfied with?

25 A. Her explanation satisfied me that there was no

1 problem.

2 Q. During your conversation, that's when you
3 first noticed the things in the living room? That
4 is, your conversation with Nicole Delgado?

5 A. Either that, or as we walked in our -- our
6 main focus when we went in was to make sure that
7 everything was okay with Nicole Delgado.

8 Q. Do you remember when you made observations of
9 either the baggie or the burnt broken vase in the
10 living room?

11 A. It would've either been as I walked in or as
12 we came back in the living room.

13 Q. Do you know which of those it was?

14 A. I think that it was probably when I first
15 walked in.

16 Q. You told us that some time before your second
17 trip to 526 A Street you had learned that there had
18 been a prior report of a domestic assault in 2004?

19 A. That's correct.

20 Q. Were you, at the time you learned that,
21 provided the date on which that report was made?

22 A. I don't know. I know it had a -- excuse me --
23 it had an A4 case, which would've been 2004. Our
24 cases go by A4 or A5, et cetera, for different
25 years. So it would've been in 2004.

1 Q. But beyond that, you don't recall specifically
2 knowing when during the year 2004 that report was
3 made?

4 A. I -- I don't recall that.

5 Q. And is it correct that you don't know whether
6 that report resulted in a prosecution?

7 A. I believe -- yeah, I don't know whether he was
8 prosecuted, but he was cited for domestic assault,
9 my understanding.

10 Q. Did you also check to see whether or not there
11 was a protection order between these two parties?

12 A. I may have, but I don't recall whether I did
13 or not.

14 Q. And finally when you interviewed Linda Barb --
15 whenever that was, either the first time or the
16 second time, when you interviewed Linda Barb she
17 told you she really had no problems with her
18 neighbors other than occasional loud music --

19 A. Yes.

20 Q. -- is that right?

21 A. That's what she said, uh-huh.

22 Q. During your two trips to 526 A Street, did you
23 ever put your hands on the Cadillac to see whether
24 or not it was warm, an indication that it had been
25 operated recently?

1 A. I don't recall doing that.

2 Q. Do you recall the weather for January the
3 11th, 2005?

4 A. I don't recall it exactly, no.

5 MR. GOOCH: That's all the questions
6 I have of this witness.

7 THE COURT: All right. Redirect?

8 REDIRECT EXAMINATION

9 BY MS. FULLERTON:

10 Q. Officer McAndrew, when you went to 526 A
11 Street the second time with Sergeant Heermann and
12 Officer Muff, did you feel that by the -- at the
13 point that you entered the apartment that's -- on
14 that second occasion, did you feel that you had
15 exhausted all the things you could to try and find
16 out what was going on inside there, short of going
17 into the apartment?

18 A. That's correct.

19 Q. Did you know of anything else you could do at
20 that point to try and find out the welfare of
21 Nicole Delgado without going into the apartment?

22 A. No.

23 Q. And at the time you entered the apartment,
24 were you concerned for her welfare based on the
25 information you'd obtained up to that time?

1 A. Yes.

2 Q. Did you enter the apartment for any other
3 reason?

4 A. Just to check her welfare.

5 MS. FULLERTON: I have no further
6 questions.

7 THE COURT: All right. I want to
8 clarify just one thing, perhaps I wasn't writing
9 correctly.

10 What was your reason for leaving 526 A Street
11 when you did the first time?

12 THE WITNESS: Basically to consult
13 with our sergeant, to see what we -- how we would
14 proceed with it. And in discussing that with her
15 and listening to the tape, it was -- she had a
16 concern that we needed to make contact to make sure
17 the gal was okay.

18 THE COURT: "She" being?

19 THE WITNESS: Sergeant Heermann.

20 THE COURT: Okay. And could you --
21 well, did you try to contact her while you were
22 still at the address of the apartment?

23 THE WITNESS: Did I contact the
24 supervisor there, sir?

25 THE COURT: Sergeant Heermann.

1 THE WITNESS: Sergeant Heermann. I
2 don't know whether I contacted her there or whether
3 we met over at the -- the police station.

4 THE COURT: Okay. Well, why did you
5 leave?

6 THE WITNESS: Why did I leave?

7 THE COURT: Uh-huh.

8 THE DEFENDANT: I exhausted what I
9 could do at that point. I didn't know what else I
10 could do to make a contact there and wanted to
11 consult with the supervisor to get some advice.

12 THE COURT: And you -- I -- I guess I
13 still don't understand why you couldn't have done
14 that by radio or telephone from where you were at
15 the apartment.

16 THE WITNESS: I -- I probably
17 could've. I -- I didn't. We ended up going to the
18 police station. And we also contacted the -- the
19 police captain while we were there to inform him of
20 what the situation was.

21 THE COURT: And how long were you at
22 the police station before you returned?

23 THE WITNESS: I don't know exactly.
24 I -- I don't know for sure. I mean, it wasn't an
25 extended period of time, but long enough to contact

1 the supervisor and the captain and try to figure
2 out how we could proceed with this.

3 THE COURT: Do you recall all of the
4 things that you did at the police station?

5 THE WITNESS: I probably -- I would
6 think that I checked the -- the police computer to
7 see, you know, if there had been any contacts and
8 to try to investigate that to see if we had any
9 information about the case that I wasn't aware
10 of --

11 THE COURT: And how long --

12 THE WITNESS: -- computer
13 intelligence.

14 THE COURT: -- did that take you?

15 THE WITNESS: I don't know for sure.
16 I -- I would have to estimate that we were maybe
17 there 20 minutes or -- or 20, 25 minutes.

18 THE COURT: How long was your
19 conversation with Sergeant Heermann?

20 THE WITNESS: Well, from the point
21 that we had first contact until the point that we
22 made contact back at the residence, I think would
23 be included in that timeframe.

24 THE COURT: No, I'm -- I'm just
25 talking about at the police station. How long was

1 your conversation with her?

2 THE WITNESS: I -- it would've -- I
3 don't know how long the conversation was. It
4 would've been within 25 -- probably 20 or 25
5 minutes to the time that we contacted her there and
6 whatnot.

7 THE COURT: And then you said you
8 also conferred with a captain.

9 THE WITNESS: That's correct.

10 THE COURT: Who was that?

11 THE WITNESS: Captain Thoms.

12 THE COURT: And was that in person at
13 the station?

14 THE WITNESS: That was at the police
15 station.

16 THE COURT: Okay. Was he on duty, I
17 take it?

18 THE WITNESS: Yes.

19 THE COURT: You -- you didn't have to
20 call him there, right?

21 THE WITNESS: No, sir.

22 THE COURT: Okay. How long was your
23 conversation with him?

24 THE WITNESS: It was brief. We
25 played the tape for him and he had indicated that

1 we should do something to try to contact this lady.

2 THE COURT: That's all the questions
3 I have.

4 Are there questions on my questions, Ms.
5 Fullerton?

6 MS. FULLERTON: I think just one,
7 Your Honor.

8 FURTHER REDIRECT EXAMINATION

9 BY MS. FULLERTON:

10 Q. Officer McAndrew, the first time that you were
11 at 526 A you were by yourself; is that right?

12 A. I went with Officer Hruza.

13 Q. With Hruza. Okay.

14 And according to police department procedure
15 if you were going to make entrance to the apartment
16 the first time you were there, would you have
17 needed a supervisor to be on site before that
18 happened?

19 A. Not in an -- not in a situation where it's an
20 emergency situation.

21 Q. But you would have to have contact --

22 A. I -- I would contact her for permission to --

23 Q. You'd have to get the -- the supervisor's
24 permission prior to doing that.

25 A. That's correct.

1 MS. FULLERTON: I don't have any
2 other questions.

3 THE COURT: All right. Mr. Gooch?

4 MR. GOOCH: No questions.

5 THE COURT: You may step down.

6 THE WITNESS: Thank you, sir.

7 MS. FULLERTON: No further evidence,
8 Your Honor.

9 THE COURT: All right.

10 MR. GOOCH: Your Honor, I would ask
11 the Court to take judicial notice that January the
12 11th, 2005 is a Tuesday -- or was a Tuesday.

13 THE COURT: I have a calendar. It
14 was. Granted. Anything else?

15 MR. GOOCH: No.

16 THE COURT: And nothing by way of
17 additional evidence then, right?

18 MR. GOOCH: Correct.

19 THE COURT: Okay. I'll hear your
20 arguments. Ms. Fullerton.

21 MS. FULLERTON: Your Honor, I've made
22 most of my arguments in my brief. I guess my
23 thought is in this case in terms of -- of -- I know
24 Mr. Gooch is going to say it wasn't exigent
25 circumstances, but I guess the question is, what

1 else was the officer supposed to do at this point?

2 He had information with respect to this tape
3 that appeared to have someone screaming on it and
4 somebody saying, I'm going to kill you. Concerns
5 expressed by the aunt of the -- the supposed
6 victim, for her welfare.

7 He checks out the place, nobody answers the
8 door. He's informed at least at some point by the
9 neighbor that if the car -- the white Cadillac,
10 is -- is there, then the -- the male resident is
11 home, and the female resident is always home. So
12 he has reason to believe there's somebody in there,
13 even though he can't get anybody to come to the
14 door.

15 At some point in the course of the
16 investigation he also becomes aware that there was
17 a prior report of an assault which -- involving
18 these two parties, which had happened within the
19 prior year, and which involved a citation at least
20 having been issued to Khalat Alama.

21 And all the efforts made by the officers to
22 make contact at this residence were unsuccessful,
23 even though the -- here that the parties were
24 there. And he didn't know of anything else he
25 could've done other than enter to find out her

1 welfare.

2 One of the things that police officers are
3 supposed to do is protect the public. And if
4 they're not allowed to go in and protect the public
5 in a situation where they have no other
6 alternative, then I don't know what they're here
7 for.

8 And while this might not be the most exigent
9 of exigent circumstances, the case that I cited to
10 you in the brief, the -- it's the Janis case, that
11 was the one where the Eighth Circuit said it was
12 exigent circumstances to go into a house looking
13 for a gun after a person had been -- had apparently
14 shot himself in the resident -- in the residence
15 and the other person who was in the residence had
16 given them permission -- the officers permission to
17 go back in and get the gun. The person who shot
18 himself didn't want them to go back in and get the
19 gun.

20 And the Eighth Circuit said that it was
21 exigent circumstances for the officers to go back
22 into a residence, which at that point at least
23 given the facts that are set out, as far as we can
24 tell in the case there was no reason to believe
25 there was anybody in the residence in imminent

1 danger of this loaded gun -- which of course
2 certainly could be a danger to somebody at some
3 point -- but there was no indication that there was
4 anybody in the residence.

5 And they said it was still exigent
6 circumstances for the police officers to go in and
7 get a loaded gun, where there was no reason to
8 believe there was anybody -- because somebody might
9 get there in the future and hurt themselves with
10 it.

11 So if that's exigent circumstances, I think
12 Officer McAndrew's circumstances in having a report
13 that -- from a woman's aunt that she'd gotten this
14 phone call where there was screaming, and listened
15 to the recording of the woman screaming and a man
16 saying, I'm going to kill you, he tried every --
17 they tried everything they could to get somebody to
18 respond. Nobody did, even though they still --
19 they had reason to believe there were parties
20 inside.

21 I think that's more exigent circumstances than
22 what was determined to be exigent circumstances in
23 the Janis case.

24 And so I think there were exigent
25 circumstances allowing him to make entry. And then

1 when he goes into the apartment for the purpose of
2 determining that -- Nicole Delgado's welfare,
3 either on the way in or in taking her back to the
4 living room to find out -- sort out the situation,
5 he sees the baggie and the burnt glass vase on the
6 living room coffee table. And Nicole just makes it
7 more obvious by trying to stuff a checkbook cover
8 over it during their conversation.

9 So those items were in plain view. He has a
10 right to be there for exigent circumstances. He
11 observes the -- the objects in plain view. And he
12 seizes them. And they ought to -- to be used as
13 evidence in this case.

14 And so I would ask the Court to deny the
15 suppression motion.

16 THE COURT: Mr. Gooch.

22 The warrant requirement ought not to be viewed
23 as a -- an inconvenience. And it shouldn't
24 plausibly be viewed as an inconvenience when on a
25 Tuesday sometime between 11:22 and before 4:00 an

1 officer investigates a two-day old telephone call,
2 a message two days old.

3 We don't have any information about whether
4 there were subsequent sightings or conversations or
5 whether Marcia Delgado said, and since the call
6 I've talked to Nicole or -- we don't have any of
7 that. We just have, I listened to the telephone
8 message and then I drove over to 526 A Street.

9 Two officers are there and it's so critical,
10 it's so urgent, the -- the danger is so imminent
11 that they talk to the neighbors -- they knock on
12 the door and they talk to the neighbors and then
13 one of them goes to the police station.

14 And we don't even know where Officer Hruza
15 went, but we know from the testimony that he didn't
16 stay on the scene. He didn't return when the
17 second troop of officers came to the scene some
18 time later on that day, and we don't know when that
19 was.

20 It's not enough to say, I was going to check
21 someone's welfare and therefore the Fourth
22 Amendment doesn't apply to someone's home.

23 The caselaw says it has to be imminent.
24 Exigent has an imminency character to it. And a
25 two-day old telephone call doesn't count. Not

1 answering the door doesn't count. And especially
2 not when the alternative is you get a judge to give
3 you permission.

4 You have to justify not getting a warrant on a
5 Tuesday in the middle of the day. It -- it just
6 seems to me to be remarkable that we hear this
7 argument about how urgent it was, that the police
8 officer was out knocking on the door and
9 investigating and then went down to the police
10 station and had a conversation. And then after the
11 conversation, well, I better go back out and we'll
12 break in.

13 You need permission from your supervisor.

14 Well, the supervisor above the supervisor is the
15 Court. And it's that simple.

16 If you have time to drive down to the police
17 station and talk to the sergeant and talk to the
18 captain, you've got time to go to the judge and
19 say, hey, Judge, this is what I know, this is what
20 I've learned, can I have permission to break into
21 the house?

22 That wasn't done. So the question of exigent
23 circumstances gets nowhere because there's no
24 urgency to this.

25 The case that the government likes to rely on

1 involves police officers who respond to a
2 concurrent shooting. They came out to the scene of
3 a shooting. They didn't come out two days after a
4 shooting. And when they got there, they followed a
5 trail of blood back into an apartment where they
6 knew there was a loaded gun.

7 Here, the officers don't know that Nicole
8 Delgado is in the house. They have the neighbor
9 saying, Nicole Delgado never leaves the house.
10 But -- but that's all they have. The neighbor
11 saying she never leaves. Never leaves? If that's
12 true, then they certainly would have gotten a
13 warrant had they bothered to ask for one.

14 But we don't know actually whether that was
15 something they had the first time or the second
16 time. We don't know. We don't know when it
17 happened. We just know that there was plenty of
18 time to leave the scene -- not even leave an
19 officer there at the door to keep an eye out, to
20 listen for sounds.

21 But, you know, Hruza and McAndrew the first
22 time. Heermann, Muff and McAndrew the second time.
23 No Hruza. So it's a fair reasonable inference that
24 Officer Hruza left.

25 If it's urgent -- if it's urgent, you kick the

1 door down or you push the cardboard aside and you
2 unlock it and you go in. You don't go down to the
3 police station and say, hey, you know, this is kind
4 of troubling, we got this two-day old phone call.

5 With all due respect, this is not exigent
6 circumstances. The Fourth Amendment requires that
7 there be a justification for not obtaining a search
8 warrant or some kind of judicial permission. That
9 didn't happen. And without that justification, the
10 motion to suppress should be sustained.

11 By the way, we don't dispute that if the
12 officer was legitimately in the living room that
13 what he saw was in plain view. It's incriminating
14 character immediately obvious. Those are issues
15 that are not raised by this motion.

16 The only question is, was the officer
17 legitimately in the living room? And we
18 respectfully submit the answer is, no.

19 THE COURT: Ms. Fullerton.

20 MS. FULLERTON: Well, the matter with
21 Janis was officers who reported to a hospital after
22 a shooting. The shooting was already over with.
23 They take information from people at the hospital
24 and then go back to the house where they don't
25 expect to -- that there's any -- as far as they

1 know, there's nobody in there.

2 There's a trail of blood leading from the
3 house out to the street where the guy got into the
4 car and was driven to the hospital. They don't
5 have any reason to believe there's anyone still in
6 the house in imminent danger of anything.

7 Except that the Eighth Circuit said there was
8 still an imminent danger apparently that somebody
9 might wander in, I guess, off the street, find a
10 loaded gun and hurt themselves with it.

11 And if that's imminent -- if that's an
12 imminent circumstance sufficient to justify the
13 officers to walk in without a warrant, then I think
14 this is a whole lot more imminent in this case
15 where the officer -- everything the officer knows
16 is, from all he can determine, is there are two
17 people in this residence.

18 One of whom has -- has reported assault by the
19 other within the past year, which that person got
20 cited for. One of whom is reported by her aunt to
21 be the person who's -- who's on a phone -- phone
22 recording, that he hears a woman screaming with a
23 man in the back -- in the background or who gets on
24 the phone and says, I'm going to kill you.

25 He has the neighbor telling him that if the

1 white Cadillac is there, the man is there. And
2 that the woman basically never leaves the
3 apartment. So he has -- he has reason to believe
4 those people are in there. He's tried everything
5 possible to get somebody to respond in some way,
6 other than breaking the door down.

7 And defense counsel, with all due respect,
8 says, oh, well, then go fill out some paperwork and
9 see if you can get a judge to authorize this while
10 maybe the guy kills her inside.

11 The officer's got to look at it from the
12 circumstances that he knew at the time. And as he
13 knew them at the time, there was nothing else that
14 he could -- he knew of that he could do. He
15 consulted with other officers who came to the --
16 had come to the same conclusion that they needed to
17 go in and check this out now. They didn't have
18 time to wait.

19 Now, the fact that nothing had happened
20 apparently and there was no problem is of no
21 relevance to the determination as to whether the
22 officers reasonably thought that there was a
23 situation they needed to get into and determine her
24 welfare.

25 So in terms of other cases that have been

1 decided, this is far more exigent than it was in
2 the Janis case. And Officer McAndrew did have a
3 legitimate reason for going into that apartment.

4 THE COURT: Well, first of all,
5 there's no issue as to standing. So the defendant
6 has the -- is legitimately raising the issue.

7 Secondly, I agree that if the officer was
8 legitimately in the residence, the plain view
9 doctrine applies and there's nothing wrong with his
10 observation or seizure of the items that were
11 described.

12 The real question in the case is whether there
13 were exigent circumstances that would justify an
14 immediate entry into the house. I don't think
15 there were.

16 And the reason I say that is that there was no
17 evidence of asking Marcia Delgado whether she had
18 talked to or seen Nicole Delgado since she had
19 received the phone message, nor that -- nor whether
20 she had made an inquiry, and why it took her two
21 days to call the police department if indeed she
22 was all that concerned.

23 There was no evidence concerning asking the
24 neighbor about any sightings. There may have been
25 inquiry as to any loud noises, because there was a

1 comment made that she said that there were -- the
2 only loud noises were loud music. But there's no
3 evidence as to what the pattern was that -- if she
4 ever saw Nicole Delgado, and how does she knew
5 (sic) that she never left the apartment.

6 Also troubling to me is the fact that the
7 officers left the premises and didn't leave anybody
8 there to observe, to cut off an escape, didn't call
9 for other -- or at least there's no evidence that
10 there was any call made for police officers to come
11 and -- and block all the exits so that whatever
12 happened after a decision was made, that it was the
13 same situation.

14 In other words, that it hadn't -- that they
15 hadn't escaped if there was some harm being done or
16 having been done.

17 The fact that the officer could have contacted
18 the supervisor by radio or telephone is also
19 curious to me. I -- because it seems to me that if
20 indeed there were that kind of stress and imminent
21 danger perceived, that they would've done something
22 as quickly as possible. And it wouldn't amount to
23 leaving the premises and chatting about it.

24 Now I understand that may be overstating it,
25 but any conference on this kind of a situation

1 could easily have been over the phone or by the
2 radio. And I was never given any evidence as to
3 why it had to be in person.

4 It's the government's burden to demonstrate
5 exigent circumstances by the preponderance of the
6 evidence. And I think all of these questions about
7 there being no evidence of these items, for
8 example, leads me to conclude that I don't have all
9 the story. But from the evidence that I have, I
10 don't think that there were exigent circumstances.

11 Realizing that other minds my differ, I will
12 put this into writing just in a summary fashion.
13 I'll have the transcript prepared on an expedited
14 basis. And enter the recommendation that the
15 motion to suppress be granted.

16 With that, is there anything else that we
17 should address in the case today?

18 MS. FULLERTON: No, Your Honor.

19 MR. GOOCH: Your Honor, there is one
20 thing that's not related to the motion to suppress.

21 In preparing for the motion to suppress, I was
22 able to contact Nicole Delgado who was unwilling to
23 voluntarily appear and testify. When I spoke to
24 her I explained to her that I was Mr. Alama's
25 lawyer and not her lawyer. But she expressed

1 concern that before she was willing to cooperate
2 with my investigation, and I assume before she was
3 willing to cooperate with the government should
4 they be interested in talking to her or whatever,
5 that she was concerned.

6 I took that to mean that she was asking that a
7 lawyer be appointed to represent her, to advise
8 her, either concerning the conspiracy charge that
9 Mr. Alama faces or -- I really don't know.

10 And I tried not to give her legal advice, just
11 to say I'll mention to the judge that you've been
12 difficult for me to get a hold of and you plan to
13 continue being difficult to get a hold of unless
14 she gets access to a lawyer to advise her.

15 I bring that to the Court's attention. I'm
16 not certain -- I haven't had a chance since I just
17 talked to her last night, I haven't had a chance to
18 research the question of whether Mr. Alama even has
19 standing to ask the Court to appoint a lawyer for
20 her.

21 But I do think the Court should be aware that
22 there is someone who is at least arguably a
23 material witness in this case, not concerning the
24 motion to suppress but concerning the larger
25 conspiracy matter, who is currently being difficult

1 to contact.

2 And what she told me is that that's because
3 she's concerned about her own rights and
4 well-being.

5 THE COURT: Okay.

6 MR. GOOCH: I guess I'm asking you to
7 consider whether it's appropriate to appoint
8 counsel. She hasn't asked you for that. And I'm
9 not going to give her legal advice about how to go
10 about it. But I think it's important that the
11 Court be aware that I did try to tell Ms. Fullerton
12 earlier about my concern.

13 THE COURT: Ms. Fullerton, any
14 comments?

15 MS. FULLERTON: No, Your Honor.

16 THE COURT: It seems to me that
17 that's something that perhaps a pretrial services
18 officer might be able to at least run down.

19 So if you will give to the -- to the officer
20 an address and phone number, it may be that that
21 can be resolved. I obviously cannot appoint
22 without having any financial information or
23 anything else.

24 MR. GOOCH: Sure.

25 THE COURT: So beyond that, I can't

1 go. Anything else?

2 MR. GOOCH: No. Thank you.

3 THE COURT: All right. We'll be in
4 recess.

5 (3:19 p.m., recessed.)

6 I, Vicki L. Jarchow, Transcriber, certify that
7 the foregoing is a correct transcript from the
8 official electronic sound recording of the
9 proceedings in the above-entitled matter.

10

11 Vicki L. Jarchow September 6, 2005

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